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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KHASEEM GREENE, Plaintiff, v. ELIZABETH POLICE DEPARTMENT; ALFONSO COLON; JAMES SZPOND; UNION COUNTY PROSECUTOR'S OFFICE; PATRICIA CRONIN; STEPHEN KAISER; DEBORAH WHITE; MARK SPIVEY; JOHN/JANE DOES 1 through 10, Defendants.	:	CIVIL ACTION NO. 2:18-cv-08972

BRIEF IN OPPOSITION TO UNION COUNTY PROSECUTOR DEFENDANTS' MOTION TO DISMISS

JOSHUA F. McMAHON
Of Counsel and on the Brief

Oral Argument is Requested

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PRELIMINARY STATEMENT[1]

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."
-*Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, Chief Justice)[2]

Khaseem Greene ("Greene"), Rutgers All-American, NFL linebacker, father, and, before this tragedy, a highly-respected man with zero criminal history, was the victim of a deliberate and wide-ranging conspiracy by members of the Elizabeth Police Department ("EPD") and Union County Prosecutor's Office ("UCPO") to deprive him of his civil and constitutional rights, and put him in a New Jersey State Prison for a crime EPD and UCPO Defendants, all along, knew he did not commit, because they had incontrovertible evidence—an actual video recording of the incident in question—that clearly proved that Greene did not commit any crime.

What this case is not about is second-guessing, or looking back in hindsight with more information, to question a prosecutor's difficult judgment call, or reasonable, albeit discretionary, decision. Greene does not urge this Court to disregard the appropriate

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[1] At the outset, it ought be noted that UCPO Defendants do not clearly delineate the precise counts, specific defendants, or specific capacity, e.g., individual or official, they seek dismissal. Thus, the undersigned has been significantly hampered in our efforts to respond because UCPO Defendants have failed to specifically articulate which legal arguments apply to which count(s), defendant(s) or capacity of said defendant(s). "[D]efendant official bears the burden of showing that the conduct for which he seeks immunity would have been privileged at common law in 1871. Thus, if application of the principle is unclear, the defendant simply loses." *Buckley* at 2620. (Scalia, J., concurring in judgment).

[2] *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) (Brennan, J.) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." (quoting *Marbury v. Madison*, 1 Cranch 137, 163 (1803)).

immunity that should be afforded an ethical and law-abiding police officer or prosecutor for making hard, challenging decisions with uncertain information where appropriate. But that is not the case here.

Rather, Greene prays that this Court will, instead, reject the UCPO Defendants' attempts to shoehorn this misconduct—which can only be described as malicious, unethical, and criminal—into that category of "prosecutorial functions" that would render prosecutors who commit, and conspire to commit, crimes against innocent persons from liability for the harm their criminal, and certainly not prosecutorial, conduct causes to innocent persons.

In short, UCPO Defendants' seek to hurl the proverbial kitchen sink at Greene's complaint, claiming that the causes of action as to the UCPO Defendants ought be dismissed, variously, on sovereign, absolute, and qualified immunity grounds. All of these arguments rest on two propositions that are demonstrably false. The first false proposition is that UCPO Defendants were engaged in prosecutorial functions. Every argument advanced by UCPO Defendants as to sovereign (Eleventh Amendment) and absolute immunity is premised on one finding: that the fact-specific conduct ascribed to the UCPO Defendants is a prosecutorial function. The burden is theirs and they have not carried it, or even offered an explanation as to how their specific conduct in this case, as opposed to sweeping generalities, would qualify as a "prosecutorial function."

As elucidated, *infra*, a prosecutor's duty is to do justice. This includes prosecuting the guilty, as well as clearing the innocent, and not just obtaining convictions. *See*, *e.g.*, American Bar Association, *Criminal Justice Standards for the Prosecution Function*,

Fourth Edition, Standard 3-1.2(b) ("The primary duty of the prosecutor is to seek justice *within the bounds of the law*, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment . . . by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to *protect the innocent* . . . and respect the constitutional and legal rights of all persons, including suspects and defendants.") (emphasis added).

To that end, no Third Circuit or Supreme Court case has ever held that a prosecutor who conspires with police officers to file false police reports, false affidavits in support of arrest warrants, or solicits and suborns perjury is engaged in a "prosecutorial" or "classic law enforcement" function, because any argument to the contrary is both a factual and legal impossibility. A function cannot simultaneously be both prosecutorial—seeking truth and justice—and criminal—lying and breaking the law. Nor do the UCPO Defendants, who offer no rigorous analysis to prove they should be immune, beyond conclusory statements that everything they did in this case amounts to a 'prosecutorial' or 'classic law enforcement' function, ever attempt to address the fundamental paradox of this argument. Likewise, the New Jersey Tort Claims Act has made clear that New Jersey has waived any sovereign immunity for actions which constitute crimes, fraud, malice or willful misconduct, which is precisely what took place in the instant matter.

The second false proposition UCPO Defendants' brief mistakenly relies upon is that UCPO Defendants had probable cause. This proposition, necessary to undergird a probable cause finding for the purposes of obtaining sovereign, absolute, and especially

qualified immunity, is false, because it ignores the specifically-pled facts in the complaint, to wit, that there was zero probable cause to ever believe Greene committed a crime because EPD and/or UCPO had custody of and/or reviewed the video within one (1) hour of the incident and specifically noted that there was one suspect (the shooter, later identified as Jason Sanders), and no mention of anyone, unidentified or not, handing Sanders a handgun, because Sanders is clearly visible on the video removing the handgun from his own (Sanders') waistband.

To bolster this argument, Greene notes that UCPO was in possession of the exact same evidence when Defendants lodged the charges as when the charges were dismissed, thereby rendering this *post hoc* argument null and void.

Finally, the UCPO Defendants' entire motion is premature because the timing, complete objective facts and actual motives of the respective UCPO Defendants are, as of this writing, insufficiently developed to warrant dismissing this matter at this early stage in the litigation, where discovery to obtain writings and witness testimony has not yet even begun. As such, this case is as much about an innocent, African-American man's ability to access and seek redress in our courts as it is to hold to account those police and prosecutors that knowingly, intentionally, and maliciously, through the fabrication and manufacture of false evidence, as well as perjury, false swearing, false police reports, falsely implicating another, and tampering with physical evidence and/or public records or information, as well as conspiracy to commit said acts, tried to imprison an innocent man.

To that end, one aspect of the relief sought, the appointment of an independent monitor, is necessary to prevent further abuse of the community by the Elizabeth Police Department and Union County Prosecutor's Office, as discovery in this case will reveal policies, procedures and customs at the EPD and UCPO, and specifically how those Agencies interact and systemically mistreat persons of color, which will render the benefits of an independent monitor quite clear.

STATEMENT OF FACTS[3]

A. All Star Café Shooting & Initial Investigation

On or about December 3, 2016, a shooting was reported to EPD in the area of South Park Street and Third Street in Elizabeth in the vicinity of All Star Cafe. Multiple gunshots were fired into a crowd of people, and several shots impacted a taxi cab in the vicinity.

Around this time, EPD Officers Mooney ("Mooney") and Haverty ("Haverty") were on patrol in the area of the 200-block of Magnolia Avenue, when they encountered a dark colored SUV and attempted to stop same. Their efforts to execute a motor vehicle stop failed and the pursuit was terminated. It was later discovered that said vehicle was registered to a romantic affiliate of Jason Sanders ("Sanders"), who was later arrested and [indicted] for the shooting at All Star Café. Sanders, according to EPD, has at least twenty-

[3] Greene contends that UCPO Defendants mistakenly omitted, or misconstrued, crucial and material facts in its motion. *See*, *e.g.*, ECF 13-2, p. 3 (omitting Greene's factual assertion, ECF 1, ¶ 29, that EPD Officers reviewed the video and made zero notation of Greene, or any person, handing Sanders a handgun); ECF 13-2, p. 4 (omitting Greene's factual assertion that the arrest warrant relied exclusively on two demonstrable lies, ECF 1, ¶ 43); ECF 13-2, p. 4 (omitting that Greene pled that Defendant Cronin was conferring with the police during the investigation, ECF 1, ¶ 34); ECF 13-2, p. 6 (omits fact that UCPO Defendant White had telephone conversation with Greene's defense attorney wherein Defendant White admitted that no probable cause existed, ECF 1, ¶ 59-60). *See also* ECF 13-2 ("Greene's claim for defamation against Spivey, a communications officer who *merely relayed truthful* information about the fact that charges were brought and the allegations underlying those charges…") (emphasis added), *but see* ECF 1, ¶ 53 ("Spivey notified the press of Greene's indictment and conveyed the aforementioned two (2) defamatory statements [that] Plaintiff is observed on video handing a gun to Sanders and Sanders stated Greene handed same a gun."). As such, due to UCPO Defendants failure to plead all facts alleged in Greene's complaint, UCPO Defendants' motion to dismiss should be denied. Regardless, Greene repeats and realleges, verbatim, the facts contained in ECF 1, ¶¶26-74, and further notes that while discovery has not begun, said discovery will further develop the facts undergirding the claims advanced by Greene.

one (21) arrests, six (6) felony convictions, and one (1) violation of probation for offenses including gun trafficking, assault, reckless endangerment, kidnapping, robbery, weapons, aggravated assault and narcotics.

Upon information and belief, Sanders was the driver of said dark colored SUV and was in the process of escaping his apprehension for the shooting he had just committed.

On or about December 3, 2016, following their aborted pursuit, Mooney and Haverty responded to All Star Café and established a crime scene. At said time, Mooney and Haverty were able to meet with All Star Café employee Jorge Santos ("Santos"). Santos displayed video from several surveillance cameras outside the establishment for Mooney and Haverty. Mooney's Investigation Report states that the "video showed the shooting suspect exiting All Star Cafe at 03:53 on their cameras and proceed to walk to the S. Park Str. Side of the building before he starts shooting." Notably, Mooney and Haverty describe one (1) suspect and make zero mention of any actor appearing to hand any object, let alone a gun, to Sanders.

On December 5, 2016, along the route said vehicle eluded law enforcement, Port Authority Police recovered a gun which was later confirmed through ballistics testing to be the weapon fired at All Star Café.

On or about December 6, 2016, video from All Star Café was recovered and taken into custody.

On or about December 19, 2016, a concerned citizen identified the shooter on the All Star Cafe video as "Big J" and, ultimately, Jason Sanders to EPD Detective Carmine Gianetta ("Gianetta").

On or about December 20, 2016, EPD Sergeant Rodney Dorilus ("Dorilus") also identified the shooter on the video as Jason Sanders, who he knew from prior encounters.

On or about December 20, 2016, Colon conferred with Prosecutor Defendant Cronin ("Cronin") regarding the investigation.

On or about December 21, 2016, EPD Officer Paul Tillotson created a "Wanted Person" flyer for Sanders to be arrested, and, in same, no mention of a second actor or suspect is mentioned, nor does anyone allege that anyone passed Sanders any object, let alone a gun.

On or about December 23, 2016, Cronin approved aggravated assault with a deadly weapon; unlawful possession of a weapon; possession of a weapon for an unlawful purpose; and certain possessions (prior convicted felon) not to possess weapons (handgun) against Sanders.

On December 30, 2016, Sanders was arrested on the aforementioned charges in Jersey City, New Jersey. Sanders was observed by an off-duty EPD officer who notified Jersey City Police Department.

B. Defendants' (Knowingly and Intentionally) Falsely Implicate an Innocent Man

On or about December 30, 2016, EPD Defendant Colon ("Colon"), with the assistance of EPD Defendant Szpond ("Szpond"), conducted a video interview of Sanders. According to Colon's supplemental investigation report summarizing the interview, Colon wrote that "Sanders also stated that the gun he (Sanders) used in the shooting was giving

(sic) to him by Khaseem Greene." This marks the first time that Khaseem Greene's name was ever mentioned in the investigation.

At or near the conclusion of the very same interview, Sanders, who repeatedly lied throughout his interview and admitted to same, is asked whether the information he provided regarding Plaintiff was true. Sanders told the police that he "lied," and the police, instead of following-up, told Sanders "you can recant at another time. Not tonight."

Upon information and belief, not a single member of EPD in a single report indicated that a person handed an object, let alone a gun, to Sanders, save Colon, who states same in his supplemental report only after interviewing Sanders.

On or about January 4, 2017, Colon conferred with Cronin regarding the status of the investigation and "advised her of the case [sic] new details." According to Colon's supplemental investigation report, Cronin approved bringing charges against Plaintiff "[a]fter reviewing the new details of the case[.]"

On or about January 4, 2017, Colon prepared a Complaint-Warrant (also known as NJ/CDR2) wherein Colon, with Cronin's approval and/or instruction, made two blatantly false statements to manufacture evidence to create probable cause against Plaintiff.

Specifically, Colon and/or Cronin knowingly and intentionally or with a reckless disregard for the truth stated that Plaintiff "was observed on surveillance video handing over a handgun" to Sanders, which is categorically false, and that Sanders "admit[ed] that [Plaintiff] handed him the handgun," which is also false because, in the very same statement the self-admitted liar and multi-convicted felon (Sanders), also admitted that he

"lied" when he claimed Plaintiff handed him a gun. These two manufactured falsehoods and no other evidence were listed by Colon as his only basis to charge Plaintiff.

Notably, in his December 22, 2016, Affidavit of Probable Cause used to obtain a Complaint-Warrant against Sanders, Colon never once mentions either a second suspect and/or anyone handing Sanders a firearm.

On or about January 4, 2017, Colon purports to contact Elizabeth Municipal Court Administrator Margaret Gonzalez to approve an arrest warrant for Unlawful Possession of a Weapon against Plaintiff. The information conveyed by Colon to Gonzalez, and the manner (telephonically, in writing, visual demonstration of evidence) it was transmitted, remains unknown, as the Complaint-Warrant purportedly prepared by Colon and provided in criminal discovery possessed neither a probable cause determination nor a judicial signature, but did contain the two (2) fabricated, manufactured falsehoods elucidated above.

On or about January 5, 2017, Plaintiff responded to EPD with his attorney. Despite being advised that Greene would not be speaking and Plaintiff turning himself in with counsel present, Colon separated Plaintiff from his attorney and brought him into an interrogation room where Colon sought to take a statement from a represented person. This was done on video.

On or about January 31, 2017, Colon closed the case pending Grand Jury.

C. Defendants' Conspire to Commit Perjury to Obtain an Indictment; Spivey Transmits Knowingly False Statements to the Press; Greene is Cut by Kansas City Chiefs

On or about May 9, 2017, UCPO Defendant Kaiser ("Kaiser"), along with UCPO Defendant White ("White") and/or on White's orders, presented manufactured, fabricated evidence to the Grand Jury, to wit, the aforementioned two (2) lies described above, in order to obtain an indictment against Plaintiff. Because the Prosecutor Defendants presented information to the Grand Jury that was manufactured, fabricated and false, they, individually and/or in concert with Police Defendants, suborned perjury before the Grand Jury in order to obtain an indictment against Plaintiff.

During the Grand Jury presentment, Prosecutor Defendants neither played the surveillance video for the Grand Jury, nor did they play the Sanders video statement. Instead, they solicited the two (2) lies delineated in this complaint from Colon.

On May 9, 2017, NJ.com reported a story entitled "Khaseem Greene cut by Kansas City Chiefs after indictment in NJ shooting: What you should know". The article begins by stating that "Khaseem Greene's fourth—and likely final—opportunity in the NFL is over. The former Rutgers football star was waived by the Kansas City Chiefs on Tuesday, just hours after NJ.com reported he was indicted in connection with a shooting outside of a nightclub in his native Elizabeth." Plaintiff's former Coach Chet Parlevecchio told NJ Advance Media that he was "flabbergasted" to be informed of Plaintiff's indictment. Coach Parlevecchio went on: "He's one of the greatest kids I've ever coached. He was a leader and everything you wish for in a football player. He was someone who was never in trouble in high school. When he was there, he was a gentleman for us. Never any trouble. He did

whatever it took on the field for us to be successful. Just a great kid, and this is news to me."

On May 10, 2017, the Kansas City Star, one of the Chiefs local newspapers, reported that "Chiefs waive Khaseem Greene after he's indicted on weapons charges".

On or about May 9 through May 11, 2017, numerous outlets, including ESPN, Bleacher Report, the Associated Press, Daily Mail, Chicago Tribune and other news outlets reported on Plaintiff's indictment, each reiterating the false, manufactured lies initiated by Police Defendants and perpetuated by Prosecutor Defendants.

On May 9, 2017, upon information and belief, Prosecutor's Office Communication Officer Spivey ("Spivey") notified the press of Greene's indictment and conveyed the aforementioned two (2) defamatory statements (Plaintiff is observed on video handing a gun to Sanders and Sanders stated Greene handed same a gun).

On or about May 9, 2017, Plaintiff was contacted by Kansas City Chiefs personnel, while Plaintiff was in Kansas City for Chiefs team workouts and instructed to return his playbook because he was being cut. Plaintiff learned from his agent that same day that Plaintiff was cut due to the indictment released earlier the same day.

On or about May 9, 2017, at approximately 6:04 p.m., the Chiefs "Tweeted" that "We have placed LB Khaseem Greene on waivers."

D. Greene Retains New Counsel; Motions for a Probable Cause Hearing, Dismissal of the Indictment, Speedy Trial and to Compel the Production of Discovery are Filed

On or about May 19, 2017, Plaintiff retained Schiller McMahon LLC (the undersigned) to assume representation of Plaintiff in the criminal matter.

On or about May 22, 2017, Plaintiff was arraigned before the Honorable Robert Kirsch, J.S.C.

Between May 22, 2017 and June 5, 2017, counsel for Plaintiff was in contact with both Kaiser and White via telephone seeking immediate dismissal of the indictment due to the harm being inflicted upon the innocent Plaintiff, and the impending NFL training camp.

On or about June 2, 2017, at approximately 6:00 p.m. EST, Plaintiff's counsel, in the presence of Jordan B. Dascal, Esquire, received a telephone call from White, wherein White indicated that then-Acting Prosecutor Grace Park refused to dismiss the case, and was instead expending precious prosecutorial resources needlessly interviewing witnesses, reviewing jailhouse phone calls, and pressuring investigators to sustain the case all the while authorizing thousands of dollars in overtime.

Most important, White, when repeatedly challenged to state otherwise, and again in the presence of Dascal, refused to state that the Government had the requisite probable cause required to proceed in a criminal prosecution, yet White, as Supervisor, proceeded with the prosecution for another six (6) weeks. This conversation lasted more than ¾ of an hour.

On or about June 5, 2017, Plaintiff, by and through counsel, filed a motion to dismiss

due to government misconduct, or, in the alternative, for an emergent probable cause hearing due to violations of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, as well as Rule of Professional Conduct 3.8 (probable cause requirement).

On June 5, 2017, Plaintiff's counsel sent a letter to the Court and Prosecutor Defendants seeking dismissal due to Government misconduct and a lack of probable cause. Counsel further indicated that Plaintiff was cut by the Kansas City Chiefs due solely to the fraudulently obtained indictment, which was obtained based upon manufactured, fabricated evidence.

On or about June 21, 2017, Plaintiff, by and through counsel, filed a motion to suppress the unlawful arrest and seizure of Plaintiff's person.

On or about June 21, 2017, Plaintiff, by and through counsel, filed a motion to compel the production of discovery or, in the alternative, dismiss the indictment.

On or about June 21, 2017, counsel for Plaintiff sent a letter to the Court and Prosecutor Defendants again reiterating the Government misconduct then taking place and requesting an emergent testimonial hearing.

On or about June 23, 2017, Plaintiff, by and through counsel, filed a motion seeking an immediate Speedy Trial.

On or about June 26, 2017, counsel for Plaintiff sent the Court and Prosecutor Defendants a letter and certification delineating the outstanding discovery and, again, requesting immediate dismissal due to Government misconduct. Counsel also sought an immediate trial date on behalf of Plaintiff, who, as a professional football player, was being

harmed with each passing day wherein the charges remained in place because NFL training camp begins in August of each summer.

E. UCPO Defendants' Concede No Probable Cause, But Refuse to Dismiss Baseless Charges for Six Additional Weeks

On or about July 12, 2017, Union County Prosecutor's Office, Trial Supervisor Doreen Yanik ("Yanik"), contacted Plaintiff's counsel and advised that the State no longer contended that Plaintiff possessed and/or passed Sanders any object, let alone a firearm. The State, in what could only serve to protect its own interests from civil liability, offered Plaintiff admission into the Pre-Trial Intervention ("PTI") diversionary program.

On or about July 15, 2017, Plaintiff declined the State's offer for PTI, due to actual innocence.

On or about July 17, 2017, the State, *ex parte* and without notice to Plaintiff's counsel, appeared before Judge Kirsch and sought, and were granted, an Order dismissing the indictment against Plaintiff.

On or about August 21, 2017, Plaintiff's counsel wrote a letter to Assistant Prosecutor John Esmerado, requesting that EPD and UCPO personnel involved in the investigation and prosecution of Plaintiff be investigated for any misconduct (administrative, criminal or otherwise) and be punished accordingly. As of the date of this filing, the status of any such investigation, and whether any discipline was meted out, remains unknown.

On or about April 11, 2018, Sanders pled guilty before the Honorable Robert Kirsch,

Judge of the Superior Court of New Jersey, to aggravated assault (second-degree) and unlawful possession of a firearm (second-degree). Sanders was scheduled to be sentenced on June 8, 2018, wherein he was expected to receive twelve (12) years in New Jersey State Prison for the aggravated assault (shooting) and a concurrent ten (10) years for the possessory gun offense.

Plaintiff was unlawfully arrested without probable cause and mistreated as described above due to his race, ethnicity, national origin, or other unlawful basis, and the illegal practices and policies engaged in by members of EPD.

As a result of the subject incident, the Plaintiff experienced mental anguish, mental and emotional suffering, embarrassment, shame, and humiliation, as well as damages to his constitutional rights due to the unreasonable seizure of his person.

STANDARD OF REVIEW

Save the last sentence of said section, Plaintiff stipulates to the Standard of Review set forth by UCPO Defendants. ECF 13-2, p. 6-7. *See also Odd v. Malone*, 538 F.3d 202, 207 (3d Cir 2008) (setting forth the applicable standard for a motion to dismiss).

ARGUMENT[4]

POINT I

UCPO DEFENDANTS ARE NOT ENTITLED TO SOVEREIGN, ABSOLUTE OR QUALIFIED IMMUNITY, BECAUSE THEY HAVE NOT ESTABLISHED THAT FABRICATING EVIDENCE AND SUBORNING PERJURY *BEFORE* CHARGING GREENE, OR OTHERWISE FRAMING AN INNOCENT MAN, ARE 'PROSECUTORIAL' ADVOCACY OR 'CLASSIC LAW ENFORCEMENT FUNCTIONS.' FURTHER, BECAUSE UCPO DEFENDANTS HAVE NOT ESTABLISHED THAT THEIR CONDUCT CONSTITUTED EITHER PROSECUTORIAL ADVOCACY OR A CLASSIC LAW ENFORCMENT FUNCTION, IT FOLLOWS THAT UCPO DEFENDANTS HAVE FAILED TO DEMONSTRATE THAT THEY ARE NOT "PERSONS"[5] WITHIN THE MEANING OF 42 U.S.C. §1983 ET SEQ. AND, FINALLY, EVEN IF SOVEREIGN IMMUNITY WERE FOUND APPLICABLE, NEW JERSEY HAS WAIVED SOVEREIGN IMMUNITY. ACCORDINGLY, THE MOTION SHOULD BE DENIED.

No court in this jurisdiction has ever explicitly held that a prosecutor who knowingly and intentionally conspires with police to file false police reports and an intentionally false affidavit in support of an arrest warrant—a literal crime in New Jersey[6]—is wholly immune from civil liability, whether it be on sovereign (Eleventh

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[4] Greene, whilst submitting that UCPO Defendants' motion to dismiss should be denied, nevertheless requests the opportunity to file an amended complaint should the Court conclude that any claims are inadequately pled. *McPherson v. U.S.*, 2008 WL 2985448, *5 (D.N.J. 2008) (Wigenton, U.S.D.J.); *Garland v. Goodman*, 2009 WL 313330 (D.N.J. 2009) (Wigenton, U.S.D.J.); *Logano* at 861.

[5] UCPO Defendants argue that Greene's §1983 claims against UCPO Defendants in their official capacities should be dismissed because they are not "persons" under §1983 jurisprudence. ECF 13-2, p. 10. This argument turns on whether the UCPO Defendants were performing classic law enforcement functions. For the reasons delineated herein, Greene submits that this question should be answered "no," or, alternatively, the claim should be allowed to remain pending the development of the record, whereupon UCPO Defendants have the opportunity to move for summary judgment. In any event, said officials were also charged in their "individual" capacity. Accordingly, this argument should be denied.

[6] Falsely incriminating another is a serious, felony-level crime in New Jersey. "A person who knowingly gives or causes to be given false information to any law enforcement

Amendment) immunity, absolute (prosecutorial) immunity, or qualified (police and prosecutor in investigative capacity) immunity grounds. To that end, the Supreme Court held that "[a]s a matter of principle, we perceive no less an infringement of a defendant's rights by the knowing use of perjured testimony than by the deliberate withholding of exculpatory information. The conduct in either case is reprehensible, warranting criminal prosecution as well as disbarment." *Imbler* at n. 34. *See also Zahrey* at n. 3 (noting that a prosecutor's manufacture of false evidence subjects the prosecutor to "criminal penalties" and "disciplinary sanctions").

On the contrary, the Third Circuit has explicitly stated that "[f]abricated evidence is an affront to due process of law, and state actors seeking to frame citizens undermine fundamental fairness and are responsible for 'corruption of the truth-seeking function of the trial process.'" *Black v. Montgomery County*, 835 F.3d 358, 370 (3d Cir 2016) (*quoting U.S. v. Agurs*, 427 U.S. 97, 104 (1976)). Further, "if fabricated evidence is used as a basis for a criminal charge that would not have been filed without its use the defendant," *id*. at 370, Greene will, amongst other actionable claims, have "a stand-alone

officer with purpose to implicate another commits a crime of the third degree, except the offense is a crime of the second degree if the false information which the actor gave or caused to be given would implicate the person in a crime of the first or second degree." *N.J.S.A.* 2C:28-4a. Here, Greene was the victim of "false information" that implicated him in a second degree (unlawful possession of a handgun) crime. *See also* N.J.S.A. 2C:28- 1 (Perjury); N.J.S.A. 2C:28-2 (False Swearing); N.J.S.A. 2C:28-6 (Tampering with or Fabricating Physical Evidence); and N.J.S.A. 2C:28-7 (Tampering with Public Records or Information).

fabricated[7] evidence claim against state actors under the due process clause of the Fourteenth Amendment if there is a reasonable likelihood that, absent that fabricated evidence, the defendant would not have been criminally charged." *Id.* at 371. (citations and quotation marks omitted). *See also Zahrey* at 348 (discussing manufacturing of false evidence and how same violates due process). Simply put, "no sensible concept of ordered liberty is consistent with law enforcement cooking up its own evidence." *Id.* at 370.

UCPO Defendants do not contest that charging an innocent man without probable cause constitutes a violation of the Constitution. *See Napue v. Illinois*, 79 S. Ct. 1173 (1959); *id*. at 1177 (holding that the "State may not knowingly use false evidence, including false testimony" in a criminal prosecution). Nor do they claim that knowingly conspiring to falsify an affidavit in support of an arrest warrant is lawful. *See McPherson* at 11 (noting that prosecutor is not acting as an advocate, and is not entitled to absolute immunity, when holding a press conference or fabricating evidence) (Wigenton, U.S.D.J.). Instead, they argue that UCPO Defendants should be dismissed because they were prosecutors, *c.f. Schneyder v. Smith*, 653 F.3d 313, 332 (3d Cir 2011) (holding that "a person is not immune from suit for every wrong he commits just because he happens

[7] The Third Circuit has defined "fabricated" as "persuasive evidence supporting a conclusion that the proponents of the evidence are aware that evidence is incorrect or that the evidence is offered in bad faith." *Black* at 372. Here, there was zero basis to charge Greene, regardless of any person's subjective statements, because of the existence of objective evidence in the form of the video. Notably, UCPO Defendants do not contest said factual allegations, to wit, that Greene is never observed on video possessing or transferring a gun to anyone.

to be employed as a prosecutor"), performing 'classic law enforcement functions'. ECF 13-2. The "official seeking immunity bears the burden of showing that such immunity is justified for the function in question." *Burns v. Reed*, 111 S. Ct. 1934, 1939 (1991). *See also Odd* at 207 ("A prosecutor bears the heavy burden of establishing entitlement to absolute immunity.). Because the burden rests with UCPO Defendants to establish sovereign, absolute or qualified immunity, and they fail to conduct the "meticulous analysis," *Odd* at 208, that our case law demands before granting them the immunity they seek, the motion ought be denied. *See also Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994) ("Their 'I didn't do it' defense . . . is not cognizable as a declaration of qualified immunity.).

To find otherwise would place UCPO Defendants into an extra-judicial orbit outside the reach of, and most certainly above, the law. Therefore, the motion to dismiss, as discussed, *infra*, should be denied.

A. Sovereign Immunity

Sovereign immunity applies to States and state officials engaged in classic law enforcement functions. However, it does not apply to counties or municipalities.[8] *See Logano* at 857. To obtain sovereign immunity, a three-step analysis under *Fitchik v. New Jersey Transit*, 873 F.2d 655, 659 (3d Cir 1989) is required. Here, aside from the functions of the prosecutors in no way being 'classic law enforcement,' no such required

[8] And, according to the *Yarris* Court, nor does sovereign immunity apply to prosecutors. The "Court has identified two kinds of immunities under §1983: qualified immunity and absolute immunity." *Yarris* at 135.

analysis took place, and, as such, the motion on sovereign immunity grounds should be denied.

Even if the aforementioned arguments are rejected, New Jersey has waived application of the sovereign immunity doctrine through its legislative implementation of N.J.S.A. 59:3-14. *See McGhee v. Pottawattamie*, 547 F.3d 922 (8th Cir. 2008) (holding that Iowa waived sovereign immunity under the Iowa Tort Claims Act). *See also*, *infra*, Point IV.

Likewise, even if the Court finds that sovereign immunity is applicable, the motion should be denied because the doctrine does not apply to Defendants sued in their individual, as opposed to official, capacity, as is the case here. *See, e.g., Lopez-Siguenza v. Roddy*, 2014 WL 1298300, n.6 (D.N.J. 2014); *Lagano v. Bergen County Prosecutor's Office*, 769 F.3d 850, 856 (3d Cir 2014) (noting that sovereign immunity does not apply to individual capacity).

B. Absolute Prosecutorial Immunity

Prosecutors operating within the scope of their duties[9] and performing a prosecutorial, as opposed to investigative or administrative, function are entitled to absolute immunity for said acts. *Imbler v. Pachtman*, 96 S. Ct. 984, 985 (1976). "The official seeking immunity has the burden to show that immunity is justified for the

[9] In *Imbler v. Pachtman*, 96 S. Ct. 984, 990 (1976), the United States Supreme Court held that "a prosecutor enjoys absolute immunity from §1983 suits for damages when he acts within the scope of his prosecutorial duties." Critically, UCPO Defendants fail to address whether the conduct they engaged can, in truth, fairly be considered "within the scope of their duties." Greene respectfully submits that it cannot.

function in question." *Williams* at 15. Essentially, the movant should engage in a "functional analysis of each alleged activity." *Kulwicki* at 1463. (internal quotation marks omitted). And, in some circumstances, a "prosecutor's behavior falls completely outside the prosecutorial role." *Id*. As such, a prosecutor will generally "not be entitled to absolute immunity . . . before the establishment of probable cause to arrest." *McGhee* at 929. *See*, *infra*, Point III.

Here, no such analysis of each act was undertaken by UCPO Defendants. For example, the law is clear that "procuring an arrest warrant," *Burns* at 1949 (Scalia, J., concurring in judgment) or "giving probable cause advice" are not susceptible to absolute immunity, *Burns* at 1943; *Kulwicki* at 1465; *Buckley* at 2614; yet, UCPO Defendants mistakenly cite to *Kulwicki* as an example of authority supporting the proposition that such advice invokes absolute prosecutorial immunity. As was the case in *Buckley*, where absolute immunity was denied for the "preindictment fabrication of evidence or the postindictment press conference" —both of which occurred here—UCPO Defendants are not entitled to absolute immunity. *Id*. at 2615. *Id*. at 2616 (holding that a "prosecutor neither is, nor should [he] consider himself to be, an advocate before he has probable cause to have anyone arrested."). *Odd* at 209. Simply put, "a prosecutor's fabrication of false evidence during the preliminary investigation of an unsolved crime . . . remains

protected only by qualified immunity." *Id*. at 2616-17. Accordingly, absolute prosecutorial immunity should be denied.[10]

C. Qualified Immunity

Public officials not covered by sovereign or absolute prosecutorial immunity may attempt to avail themselves of qualified immunity, which protects public officials except for the "plainly incompetent or those who knowingly violate the law." *Burns* at 1944; ECF 13-2, p. 17. Yet, unlike absolute prosecutorial immunity, the "fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial." *Imbler* at n. 13. Here, police officers and prosecutors, despite having video of the entire incident, committed multiple crimes by falsely swearing-out an affidavit that had the effect of misleading the court into issuing an arrest warrant for an innocent man. Because UCPO Defendants are either utterly incompetent, or criminals themselves, they are not entitled to qualified immunity. "The conduct in either case is reprehensible, warranting criminal prosecution as well as disbarment." *Imbler* at n. 34. Accordingly, the motion to dismiss for qualified immunity should be denied.

[10] The *Yarris* Court held that, where it is pled that the prosecutor concocted a false and fabricated confession, absolute immunity was not appropriate to determine at a motion to dismiss. *Id*. at 138.

POINT II

EVEN IF THE COURT FINDS THAT UCPO DEFENDANTS HAVE ESTABLISHED THAT FRAMING AN INNOCENT MAN IS A "CLASSIC LAW ENFORCEMENT FUNCTION," THE NATURE (ADVOCACY OR INVESTIGATIVE) AND TIMING (PRE-INDICTMENT OR POST-INDICTMENT) OF THE ACTS HAVE NOT BEEN PROVEN, THEREBY NECESSITATING FURTHER FACTUAL DEVELOPMENT. CONSEQUENTLY, THE MOTION TO DISMISS SHOULD BE DENIED.

Where a genuine issue exists as to whether an official is engaged in a prosecutorial, advocacy function, which turns on the nature of the act, as well as its temporal proximity to the judicial process, the motion should be denied to allow either development of the record, or a finding of fact by the jury. *Zahrey v. Coffey*, 221 F.3d 342, 344 (2d Cir. 2000) (concluding that "the allegations of the complaint suffice to indicate that a qualified immunity defense may not be sustained without further development of the facts."); *Williams* at 16. "*Yarris* teaches that the period during which prosecutors are most likely functioning in a 'quasi-judicial' capacity is the time between indictment and dismissal, acquittal or conviction." *Odd v. Malone*, 538 F.3d 202, 210 (3d Cir 2008). Here, the wrongdoing occurred pre-indictment, at the time of indictment, and post-indictment, in the UCPO Defendants malicious and corrupt refusal to dismiss the charges, despite admitting a lack of probable cause, thereby causing Greene to miss his opportunity to compete for a roster position at NFL Training Camp (Kansas City Chiefs).

Likewise, because the precise timing of the bad acts is not fully-developed, the motion should be denied to develop the factual record. *Odd* at 210. *See also Kulwicki v. Dawson*, 969 F.2d 1454, 1468 (3d Cir 1992). *Zahrey* at 347 (ascertaining whether

prosecutor's act was investigator or advocacy "required fact-finding"). Consequently, the motion to dismiss should be denied to allow the requisite "fact-finding".

POINT III

EVEN IF THE COURT FINDS THAT UCPO DEFENDANTS CONDUCT CONSTITUES A PROSECUTORIAL FUNCTION, AND THAT THE MATTER DOES NOT NECESSITATE FURTHER FACT-FINDING, THE MOTION SHOULD BE DENIED BECAUSE NO PROBABLE CAUSE EVER EXISTED TO CHARGE GREENE.

The UCPO Defendants attempt to conduct a divide and conquer analysis and assert that probable cause existed to charge Greene, whilst ignoring settled law that any probable cause determination should be based upon the "totality of circumstances" objectively known to the person at the time. *Williams v. City of Newark*, 2016 WL 1396283, at *11 (N.J. App. Div. 2016). As such, because Defendants had incontrovertible, objective evidence in the form of video that Greene committed no crime, the incomplete statement of Sanders cannot and does not contravene said objective fact. Nor do the UCPO Defendants even attempt to argue that they acquired new, or additional information, which rendered their initial decision to charge lawful, because the UCPO Defendants did not acquire any new or additional information which would have altered their probable cause calculus. Thus, when UCPO Defendants argue that they had probable cause based on the demonstrable lies of a self-admitted liar and multi-convicted felon, the argument collapses because, as noted *supra*, the entire incident was captured on video, which clearly demonstrates that Greene neither possessed nor transferred any weapon to anyone that evening, and any statement to the contrary is *ipso facto* false because the video was observed by members of EPD and in the custody of the State

within an hour of the shooting, several weeks before any statement was taken from Sanders or any charges were filed. Nor did a single police report, witness or officer documenting their actions on this case ever mention either a second suspect, or seeing a person transfer a handgun to Sanders.

Therefore, any attempt by UCPO Defendants to portend either probable cause, or that the UCPO Defendants were engaged in a prosecutorial function, is a straw man because the conduct in question is entirely on video.[11]

Likewise, Defendant White acknowledged that UCPO did not have probable cause but continued the prosecution for an additional six (6) weeks. "The continuation of even a lawful arrest violates the Fourth Amendment when the police discover additional facts dissipating their earlier probable cause." *Wilson v. Russo*, 212 F.3d 781 (3d Cir. 2000) (*quoting BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986). As such, because there was no probable cause, at any point, to arrest Greene, UCPO Defendants motion should be denied.

[11] Abraham Lincoln once quipped: "How many legs does a dog have if you call his tail a leg? Four. Saying that a tail is a leg doesn't make it a leg." 242 REMINISCNENCES OF ABRAHAM LINCOLN 1889 (University of Michigan, Scholarly Publishing Office).

POINT IV

UCPO DEFENDANTS ARE NOT IMMUNE FROM STATE LAW CLAIMS FOR MALICIOUS PROSECUTION, ABUSE OF PROCESS, NEGLIGENCE AND DEFAMATION BECAUSE THEIR CONDUCT CONSTITUED A CRIME, ACTUAL FRAUD, ACTUAL MALICE OR WILLFUL MISCONDUCT.

In UCPO Defendant's motion, Point VI, ECF 13-2, UCPO Defendants argue that they are immune from state law claims under the *New Jersey Tort Claims Act* ("NJTCA"). UCPO Defendants are incorrect because N.J.S.A. 59:3-14 provides that no public employee shall be exonerated if it is established that their conduct was either (1) outside the scope of his employment or (2) constituted a crime, actual fraud, actual malice or willful misconduct. Both provisions apply here.

In *Toto v. Ensuar*, 196 N.J. 134 (2008, former New Jersey Supreme Court Justice Wallace noted that there is no tort claims act immunity for false arrest or false imprisonment, N.J.S.A. 59:3-3, but, more important, under N.J.S.A. 59:3-14, if it is established that the public employee engaged in a crime, actual fraud, actual malice or willful misconduct, then the "full measure of recovery applicable to a person in the private sector controls." *Toto* at 148. Here, Greene alleges that the police and prosecutors intentionally conspired to create false reports, falsely swore out affidavits in support of arrest warrants they knew they did not have probable cause to seek, and presented perjured testimony to the Grand Jury. Thus, framing an innocent man for a crime he did not commit is both outside the scope of either a police officer or prosecutor's function, and, further, said conduct constitutes a crime, fraud, malice and/or misconduct.

Accordingly, and in accord with Justice Wallace's holding, UCPO Defendants arguments premised on the NJTCA must fail.

POINT V

UCPO DEFENDANTS HAVE FAILED TO ESTABLISH THAT ABUSE OF PROCESS CLAIMS ONLY APPLY TO CIVIL ACTIONS FILED AGAINST A PARTY, THEREFORE, THE MOTION SHOULD BE DENIED.

UCPO Defendants, in Point VII of their brief, ECF 13-2, p. 21, allege that abuse of process claims cannot survive because they involve the "institution of criminal proceedings[.]" *Id*. UCPO Defendants are mistaken. *See Evans v. City of Newark*, 2016 WL 2742862, *5 (D.N.J. 2016) (McNulty, U.S.D.J.) (noting that abuse of process claims exist under §1983 and at the common law for criminal actions). Accordingly, UCPO Defendants' motion to dismiss should be denied.

POINT VI

UCPO DEFENDANTS CONSPIRED TO DISSEMINATE KNOWINGLY FALSE INFORMATION THAT GREENE, AN INNOCENT MAN, COMMITTED A FELONY, AND, THERFORE, UCPO DEFENDANTS MOTION TO DISMISS THE DEFAMATION CLAIM SHOULD BE DENIED.

Greene set forth specifically pled facts that UCPO Defendants have failed to indicate do not state a claim on their face. Rather, UCPO Defendants cite to the *Open Public Records Act* ("OPRA") statute and invoke same, without citing to any authority, as some form of quasi-affirmative defense to UCPO Defendants (including Spivey)

defaming Greene.[12] Further, UCPO Defendants invoke facts outside the pleadings to advance their arguments. *See* ECF 13-2, p. 23 ("[T]here is plainly no basis to suggest Spivey was intimately familiar with the investigation or has reviewed the evidence in the criminal case against Greene and would have been aware of any alleged false statements about Sanders having implicated Greene, or alleged misleading statements about the contents of surveillance video."). First, UCPO Defendants seem to be defying the standard and contesting the facts alleged in the pleading. More important, UCPO Defendants are asserting facts not in the record, to wit, what Spivey knew or did not know and when he knew it or did not know it. Accordingly, because UCPO Defendants reject Greene's facts, and insert their own unsupported facts, their motion to dismiss should be denied.

* * *

The course that the UCPO Defendants urge this Court to adopt would place prosecutors who knowingly and intentionally engage in malicious, fraudulent, unethical and criminal conduct outside and above the law's reach, not because framing an innocent African-American man and wholly fabricating an entire case can somehow be considered a "prosecutorial function," but merely because prosecutors are the ones who themselves

[12] Multiple Courts have concluded that absolute prosecutorial immunity does not apply to a prosecutors' statements to the press. *See Buckley v. Simmons,* 113 S. Ct. 2606, 2618 (1993*)*; *Kalina v. Fletcher*, 118 S. Ct. 502 (1997) (prosecutor is not, for absolute immunity purposes, an 'advocate' when he confers with the press). In any event, as it relates to Spivey, he is not a prosecutor, and those with whom he conspired to defame Greene are, at best, entitled to qualified immunity. *Kulwicki* at 1466-67 (holding that dissemination to press of criminal charges was not entitled to absolute immunity because it was, at best, administrative, warranting only qualified immunity).

committed the absolutely unethical, abhorrent and criminal conduct and, as such, should be immune from the law. Respectfully, this is not the law, it is certainly not justice, and with the utmost respect, we pray this Court will refuse to stamp its judicial imprimatur on such conduct, and allow Greene to seek the legal redress he most assuredly deserves.

CONCLUSION

For the foregoing reasons, Greene respectfully prays that this Court will deny UCPO Defendants' motion to dismiss. Alternatively, Greene hereby requests to amend the complaint to cure any defects.

Respectfully submitted,

SCHILLER McMAHON LLC

/s/ Joshua F. McMahon
By:_____
Joshua F. McMahon
NJAID 043282005

DATE: September 4, 2018
Westfield, New Jersey

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on September 5, 2018, we electronically filed the foregoing with the Clerk of the Court using CM/ECF. We also certify that the foregoing document will be served on all parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Joshua F. McMahon
By: _____
Joshua F. McMahon

Dated: September 5, 2018